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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

v

AMERICAN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	22
APPENDIX A	
Opinion of the Court Below	23
APPENDIX B	
Judgment of the Court Below	34
APPENDIX C	
Opinion of the Court Below in *Independent Petroleum Workers* v. *Standard Oil Co.* (Decided March 2, 1960)	35

TABLE OF CITATIONS

Cases

Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 283 F. 2d 93 (3rd Cir. 1960) 15, 16

Celanese Corp. of America, 33 Lab. Arb. 925 (1959) 11

Commissioner v. Sunnen, 333 U. S. 591 (1948) 17, 22

Cromwell v. County of Sac, 94 U. S. 351 (1877) 19

Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U. S. 254 (1962) 14

Harris Structural Steel Co. v. United Steelworkers, 298 F. 2d 363 (3rd Cir. 1962), *cert. denied* 369 U. S. 851 (1962) 16

Independent Petroleum Workers v. Standard Oil Co., 44 LRRM 2676 (N.D. Ind. 1959), *affirmed*, 275 F. 2d 706 (7th Cir. 1960) 3, 5, 17

International Tel. & Tel. Co. v. Local 400, International Union of Elec. Workers, 286 F. 2d 329 (3rd Cir. 1960) 16

Page

International Union of Elec. Workers v. Westinghouse Elec. Corp., 326 F. 2d 758 (2d Cir. 1964), *affirming per curiam*, 218 F. Supp. 82 (S.D.N.Y. 1963) 14

International Union, UAW v. Cardwell Mfg. Co., 304 F. 2d 801 (10th Cir. 1962) 16

International Union, UAW, Local 391 v. Webster Electric Co., 299 F. 2d 195 (7th Cir. 1962) 5

National Tube Co., 17 Lab. Arb. 790 (1951) 11

Pacific Northwest Bell Telephone Co. v. Communications Workers, 310 F. 2d 244 (9th Cir. 1962) 16

Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co., 298 F. 2d 644 (2d Cir. 1962) 16

State Farm Mutual Ins. Co. v. Duel, 324 U. S. 154 (1945) 20

Taft Broadcasting Co. v. Radio Broadcast Technicians, 298 F. 2d 707 (5th Cir. 1962) 16

United Steelworkers v. American Mfg. Co., 363 U. S. 564 (1960) 9-15, 22

United Steelworkers v. General Elec. Co., 327 F. 2d 853 (6th Cir., Feb. 19, 1964), *affirming* 211 F. Supp. 562 (N.D. Ohio 1962) 14

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574 (1960), *reversing* 269 F. 2d 633 (5th Cir. 1959) 3, 5, 6, 9-15, 22

Westinghouse Elec. Corp. v. Local 1790, Int'l Ass'n of Machinists, 304 F. 2d 449 (1st Cir. 1962) 14, 15

Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 217 F. Supp. 622 (W.D. Pa. 1963) 15

Statutes

28 U.S.C. § 1254(1) 2

Labor-Management Relations Act, § 301(a), 61 Stat. 156, 29 U.S.C. § 185 2

Miscellaneous

Crawford, *The Arbitration of Disputes Over Subcontracting* (published by the Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators, p. 51) 11

Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942) 22

Restatement, Judgments (1943) 19, 20, 22

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 21, 1963.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Indiana is set forth on pages 43-47 of the Joint Appendix in the court below (nine copies of which have been filed with this Court) and is reported at 215 F. Supp. 1. The opinion of the Court of Appeals is reported at 324 F. 2d 903 and is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1963. Petitioner filed a timely petition for re-

hearing which was denied by the Court on January 6, 1964. This Court has jurisdiction to review the judgment herein by a writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under a collective bargaining agreement providing for arbitration of "alleged violations of the terms of this agreement" and of "questions of . . . alleged noncompliance with past practices, customs or usages relative to working conditions," a union seeks arbitration of a claim that management violated the "recognition" clause of the agreement and departed from past practice in contracting out certain work.

1. Should the court order arbitration of the grievance, notwithstanding its belief that neither the "recognition" clause nor past practice limited the right of management to contract out work?

2. Is the doctrine of "collateral estoppel" a proper basis for denying arbitration of such a grievance, where in a prior action, involving another contracting-out grievance arising under an identical arbitration clause in an earlier agreement, the court had denied arbitration on grounds which have subsequently been repudiated by decisions of this Court?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action, like *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), brought under Section 301 of the Labor-Management Relations Act, to compel arbitration of a grievance complaining that an employer violated a collective bargaining agreement by contracting out certain work.

The union which brought the suit is the Independent Petroleum Workers of America, Inc., a labor organization which has for many years represented approximately 3,000 workers at a refinery in Whiting, Indiana. It will be referred to hereinafter as "the Union." The employer is the American Oil Company. It is the successor to the Standard Oil Company of Indiana (J.A. 27). No distinction is drawn in the pleadings between American and Standard and they will be referred to herein interchangeably as "the Company."

The Prior Litigation

In October, 1957, the Union protested the action of the Company in contracting out certain maintenance and repair work: the erection and tearing down of a scaffold and the performance of cement and stucco finishing in connection with the repair of a garage.[1] The Union filed a grievance claiming that this action violated the recognition clause[2] of

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[1] The facts here described are set forth in the opinion of the Court of Appeals in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to this petition.

[2] The recognition clause is found in Article I of the Agreement (J.A. 9) and provides in pertinent part as follows:

> "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company under the supervisory jurisdiction of the Manufacturing and Research Departments at its Whiting, Indiana, plant; except confidential employees, all employees represented by Research and Engineering Professional Employees As-

the agreement and was not in compliance with past policies, practices and customs. When no settlement was reached, the Union requested that the matter be arbitrated.

The agreement then, as now, contained in Section 9 of Article II an unlimited grievance procedure permitting any "questions" at all to be made the subject of a grievance. The final step in the procedure was arbitration which, however, was subject to the following limitation:

> "Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> * * * *
>
> 3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, . . .
>
> * * * *
>
> "D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement, shall be suspended but solely with respect to the

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sociation and by Office Employees Association, and all guards, professional employees and supervisors as defined by the National Labor Relations Act, as amended."

issue concerning which either party shall have so refused to arbitrate."

The Company took the position that the grievance was not arbitrable, and the Union filed suit under Section 301. In the suit, the Union relied solely on subparagraph (3) of Section 10 A, making arbitrable all questions of "alleged noncompliance with past policies, practices . . . relative to working conditions."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.*, 44 LRRM 2676 (N.D. Ind. 1959). On March 2, 1960, the Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (reprinted in Appendix C, *infra*).

In reaching its conclusion, the Seventh Circuit relied heavily on the decision of the Fifth Circuit in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 269 F. 2d 633 and, like the Fifth Circuit, decided essentially that the grievance was not arbitrable because both the negotiating history and the past practice of the parties on the substantive issue of contracting out made it clear that the grievance was without merit.[3] The critical section of the opinion reads as follows:

"[2] In our opinion the language of Section 10 A. (3) of the agreement relating to past policies, practices, customs or usages 'relative to working conditions' was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors.

[3] The Seventh Circuit has since characterized its holding in this case in the following language: "Until June 20, 1960, when *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, was decided . . . most federal courts, including this Court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work . . ." *International Union, UAW, Local 391* v. *Webster Electric Co.*, 299 F. 2d 195, 196-197 (1962).

United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Company, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The continued bargaining on the subject evidences their intent and understanding.

"In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative." 275 F. 2d at 709.

One hundred ten days later — on June 20, 1960 — this Court reversed the *Warrior & Gulf* case upon which the Seventh Circuit had relied. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574.

Meanwhile, on August 27, 1959—before the Court of Appeals rendered its decision—a new collective bargaining agreement was made (J.A. 30). This agreement contained the same arbitration language and the same recognition clause as the old agreement. During its term a new dispute about the contracting out of work arose.

The Present Litigation

In October, 1960, the Company contracted out certain crane-operating work (J.A. 34). The Union claimed that this violated the recognition clause of the 1959 agreement and also violated a practice of more than ten years standing that all crane-operating work at the refinery was assigned to employees of the Crane Department if such employees were qualified to perform the particular work (J.A. 34, 41).

A grievance was filed and processed but no satisfactory settlement was reached. The Union then sought arbitration (J.A. 35). When the Company refused, on the ground that

the dispute was not arbitrable, the present suit was instituted (J.A. 23).

The complaint was in two parts. The Union claimed first that the dispute was arbitrable under subparagraph (1) of Section 10 A because the grievance alleged that the Company's action violated the recognition clause of the agreement (J.A. 4-6). Secondly, the complaint claimed that the dispute was arbitrable under subparagraph (3) of Section 10 A because the grievance alleged that the Company's action violated an established policy, practice and custom of assigning all crane-operating work to employees of its crane department, provided that such employees were qualified to perform such work (J.A. 7).

The Company, in its answer, denied the existence of a past practice and denied that the claim of violation of the agreement was arbitrable (J.A. 24-26). As an additional defense, the Company alleged that the issue presented in the complaint was identical to the issue which had been presented in the prior litigation, and that therefore any relief on the present complaint was barred (J.A. 26-28).

Both parties moved for summary judgment. The Union's motion relied exclusively on its first claim, based upon the allegation of violation of the agreement (J.A. 20). The Company's motion asked for summary judgment on both claims (J.A. 28).

The District Court granted the Union's motion, denied the Company's motion, and directed the Company to proceed to arbitration of the grievance (J.A. 48). The Court, in a memorandum opinion, said:

> "Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of 'alleged violations of this agreement.' Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration" (J.A. 46).

The earlier decision by the Court of Appeals, the District Court held, was inapplicable because it had been decided solely on the basis of Section 10 A (3), dealing with arbitration of questions involving past practices. Furthermore, that decision was made prior to the Supreme Court's *Warrior* opinion and relied heavily on the decision of the Fifth Circuit in the *Warrior* case which was subsequently reversed (J.A. 47).

On appeal, the Court of Appeals reversed the decision of the District Court, and remanded the case with directions that the Union's motion for summary judgment be denied, and the Company's motion on both claims be granted. (Appendix C, *infra.*)

Although the Court's order disposes of both of the Union's claims, its opinion discusses only the ~~claim~~ that the grievance was arbitrable under subparagraph 1 of the arbitration provision, which provides for arbitration of alleged violations of the agreement. The grievance was not arbitrable under that provision, the court said, because there is no clause in the agreement dealing with contracting out. Pointing out that the Union relied on the recognition clause as the basis for its grievance, the court held that that clause was inapplicable because it made no reference either to arbitration or to the contracting out of work. The court stated that that clause only required the Company to bargain with the Union on wages, hours and working conditions. Since the Company had bargained on this very grievance, the court concluded that it had fulfilled its obligations under the recognition clause (App. A., pp. 27-28).

To the Union's argument that this question was for the arbitrator since the Union had alleged that there was a violation of the agreement, and the arbitration clause made arbitrable any questions "involving or arising from applications, interpretations or alleged violations of the terms of this agreement," the court responded that "plaintiff's position is devoid of all logic. It is without merit and we so hold" (App. A, p. 28).

The court went on to refer to the bargaining history on the subject of contracting out and concluded that this history fortified its conclusion that the plaintiff's claim was without merit (App. A, p. 29).

The court then turned to the question raised by the Company's reliance on the prior decision of the Circuit Court. It concluded that, although in the first case the Union had relied on the past practice clause while in this case it was relying upon the contract violation clause, the dispute was essentially the same. Ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective agreement, the court said that "the plaintiff in both cases has presented the same claim or demand . . . The only difference is that in the present case it offers in support of its claim a different reason . . ." The Union, therefore, was barred by the doctrine of collateral estoppel (App. A, pp. 29-30). The Court summed up its holding in the following words:

> "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action" (App. A, p. 33).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that the grievance in this case is not subject to arbitration under the parties' collective bargaining agreement is squarely in conflict with the decisions of this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). In both of those cases, this Court held that when a collective bargaining agreement provides for arbitration of questions as to the meaning, interpretation, or application of the agreement, an employer is obligated to arbitrate any claim by the union

that the agreement has been violated. The Court emphasized that the merits of the union's grievance should have absolutely no bearing on the question of whether that grievance is subject to arbitration:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, *or determining whether there is particular language in the written instrument which will support the claim.* The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." 363 U.S. at 568 (emphasis added).

In the present case, the agreement provides that "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement" are subject to arbitration. It also provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions." (J.A. 12-13). The Union claimed that the Company's assignment of crane-operating work to outside contractors in the circumstances of this case violated the recognition clause of the agreement, and also departed from past practice. (J.A. 34). Plainly, under the principles established in *American Manufacturing* and *Warrior & Gulf* the Union's claims are arbitrable.

The court below held that the alleged violation of the recognition clause was not subject to arbitration because "the recognition clause makes no reference either to arbitration or to the contracting out of work." In other words, the court itself decided the question which the Union wished to submit to arbitration—whether the recognition clause does impose some limitation on the Company's right to assign work to independent contractors. The court's entire opinion is based on the premise that the Company's sole obligation under the recognition clause is to bargain with the Union—a

premise which begs the very question which the Union wished to arbitrate.

While the merits of the union's grievance have no bearing on the issue before the Court ("the processing of even frivolous claims may have therapeutic values" 363 U. S. at 568), it is noteworthy that there is considerable authority for the Union's interpretation of the recognition clause. A substantial body of arbitration opinion holds that a recognition clause such as is involved in this case (and in virtually every collective bargaining agreement) does imply some limitation on the right of management to contract out the work of the unit for which the employer has agreed to recognize the union as bargaining representative. The reasoning normally relied upon by arbitrators is exemplified by a decision of Sylvester Garrett, past president of the National Academy of Arbitrators and Chairman of the Board of Arbitration under the agreement between the United Steelworkers of America and United States Steel Corporation:

> "In view of the fact that the union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." *National Tube Co.*, 17 Lab. Arb. 790, 793-94 (1951).[4]

The court characterized as "devoid of all logic" the argument that "the mere allegation that the agreement has been violated, *ipso facto*, entitles [the Union] to arbitration." This proposition, dismissed so cavalierly by the court below, is of

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[4] See also *Celanese Corp. of America*, 33 Lab. Arb. 925, 942-43 (1959) (table of contracting-out cases showing 16 instances in which arbitrators relied on the recognition clause); Crawford, *The Arbitration of Disputes over Subcontracting* (published by the Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators) pp. 51, 67.

course precisely what this Court held in *American Manufacturing:*

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> * * * * *
>
> "The Union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U.S. at 567-69.

Perhaps most directly in point is the Court's decision in *Warrior & Gulf,* which involved a grievance, like the one in the present case, claiming that the employer had violated the agreement by contracting out certain work. The employer in that case, as in the present case, argued that no provision of the agreement restricted management's right to assign work to contractors. And in that case, as in the present one, the Union had in the past unsuccessfully attempted to negotiate a specific contractual provision dealing with

contracting out. Both the District Court and the Court of Appeals in *Warrior & Gulf*, as well as the dissenting member of this Court, considered that fact significant—as did the court below in the present case. But the majority of this Court recognized that this type of bargaining history is relevant only to the merits of the Union's grievance, not to the question of arbitrability:

> "The grievance alleged that the contracting out was in violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration.
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 U.S. at 585.

The reasoning of this Court in *Warrior & Gulf* and *American Manufacturing* is, of course, equally applicable to the Union's second claim in this case: that the grievance was arbitrable under the provision of the agreement requiring arbitration of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." A court's view of the merits is no more a basis for denying arbitration under a provision providing for arbitration of claimed departures from past practice than it is for denying arbitration of a claim that the terms of the agreement have been violated. In neither situation is there any reason to assume that the parties intended to submit to arbitration only grievances which a court believes have some merit. And in both situations the federal policy favoring grievance arbitration is applicable.

Respondent, in its argument below, urged that the present

case could be distinguished from *American Manufacturing* and *Warrior & Gulf* on the ground that the latter cases involved agreements with absolute no-strike clauses, while the agreement in this case permits strikes over matters "relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement . . ." This argument, which was not relied upon by the court below, is, of course, totally lacking in merit. The *American Manufacturing* and *Warrior & Gulf* decisions are not limited in their applicability to agreements containing absolute no-strike obligations. The concurring opinion of Mr. Justice Brennan makes this absolutely clear, 363 U.S. at 564. And the other courts of appeals which have passed on the question have so held. *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 326 F. 2d 758 (2d Cir. 1964), *affirming per curiam* 218 F. Supp. 82 (S.D.N.Y. 1963); *United Steelworkers* v. *General Elec. Co.*, 327 F. 2d 853 (6th Cir., Feb. 19, 1964), *affirming* 211 F. Supp. 562 (N.D. Ohio 1962); *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962) (in which precisely the same argument was made in Appellant's Brief).[5] See also *Drake Bakeries Inc.* v. *Local 50, American*

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[5] The employer in that case argued as follows:

> "The *Warrior & Gulf* contract contained an 'absolute' no-strike clause in the contract, by which the Union bound itself not to strike over any grievances during the life of the contract . . .
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> "Here, in sharp contrast, the contract contains an express exception to the no-strike clause, in all cases where the Company denies that a particular grievance presents an arbitrable question. Section 13 of Article XVIII. In other words, the parties here, with respect to disputes not resolved in the grievance procedure, have bargained, not for the absolute *quid pro quo* found in Warrior & Gulf (of arbitration in every instance) but for an alternative: if the particular issue, arbitrability of which has been disputed by the Company, is (by reason of its broad scope or significance or otherwise) of sufficient concern to the Union,

Bakery Workers, 370 U.S. 254, 261 n. 7.[6]

2. Since this Court decided *American Manufacturing* and *Warrior & Gulf*, the lower federal courts have, almost without exception, applied the proper test in determining the arbitrability of grievances arising under collective bargaining agreements. It is not surprising, therefore, that the present decision is in conflict with the decisions of a number of other Circuits. Thus, in *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), the court summarily ordered arbitration of a contracting-out grievance on the authority of *Warrior & Gulf*. The agreement in that case, as in the present case, contained no express provision dealing with contracting out. Moreover, the agreement there, as here, had a limited no-strike clause which permitted the union to strike on matters not subject to arbitration. The employer in that case also argued that the absence of an absolute no-strike clause required a narrower interpretation of the arbitration provision than was adopted in *Warrior & Gulf*.[7] The court rejected the argument without even deigning to mention it.

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the Union is given express freedom to use, or threaten the use of, its customary and powerful sanction, the strike. Otherwise stated, the appellant Company has deliberately accepted the risk of a strike in order to protect itself against unwarranted arbitral intrusion into areas of solely management concern. The whole concept and approach to the arbitration clause is completely and significantly different from the *Warrior & Gulf* case." Brief for Appellant, *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), pp. 15-16.

[6] The only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W.D. Pa. 1963). That case, however, seems in conflict with a decision of the Third Circuit in a suit to compel arbitration brought on the same agreement, and involving the same parties, in which the court stated that those principles were controlling. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).

[7] See note 5 *supra*.

Other decisions directing arbitration of contracting-out grievances under arbitration clauses similar to that involved here are: *International Tel. & Tel. Co.* v. *Local 400, International Union of Elec. Workers*, 286 F. 2d 329 (3rd Cir. 1960); *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962). See also *Taft Broadcasting Co.* v. *Radio Broadcast Technicians*, 298 F. 2 707 (5th Cir. 1962) (ordering arbitration of grievance protesting displacement of employees by new equipment); *International Union, UAW* v. *Cardwell Mfg. Co.*, 304 F. 2d 801 (10th Cir. 1962) (ordering arbitration of grievance protesting assignment of certain work to supervisors).

Similarly, there are a number of cases in which the employer has contended that the Union's grievance constituted an attempt to obtain something which the Union had failed to obtain (or had given up) during contract negotiations. The Courts of Appeals have uniformly held that such bargaining history is relevant only to the merits of the grievance, not to the question of arbitrability. *International Union, UAW* v. *Cardwell Mfg. Co.*, 304 F. 2d 801 (10th Cir. 1962); *Harris Structural Steel Co.* v. *United Steelworkers* 298 F. 2d 363 (3rd Cir. 1962), *cert. denied*, 369 U.S. 851 (1962); *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).[8]

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[8] The decision in *Pacific Northwest Bell Telephone Co.* v. *Communications Workers*, 310 F. 2d 244 (9th Cir. 1962), relied upon by the court below, is not in conflict with these cases. There the union sought arbitration of a grievance protesting the disciplinary suspension of an employee. The employer offered to prove that when the arbitration clause was negotiated it was understood between the parties that disciplinary suspensions would not be subject to arbitration. The Court held that such bargaining history was relevant, since it went to the question of arbitrability, not to the merits. The Court was very careful to point out that a different result would have been reached if the employer had merely attempted to produce evidence of bargaining history on management's right to impose disciplinary suspensions. 310 F. 2d at 248-49.

The present case, in short, constitutes the first substantial departure by any court of appeals from the principles laid down in *American Manufacturing* and *Warrior & Gulf*. If the decision below is permitted to stand, it will inevitably tend to cause a renewal of the confusion and conflict which this Court sought to put to rest in those decisions. Employers in the Seventh Circuit—which includes the heavily industrialized area around Chicago—and perhaps elsewhere as well, will once again be encouraged to resist arbitration of grievances which, under the applicable decisions of this Court, are plainly arbitrable. To avoid this result, this Court should eliminate the conflict in the law which the present case has created by granting this petition for certiorari and reversing the decision below.

3. To the extent that the court below relied upon the doctrine of "collateral estoppel" in support of the result it reached, its decision is clearly erroneous and squarely in conflict with the decision of this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948).

The theory of the court below was that its earlier decision in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), in which it had denied arbitration of a different contracting-out grievance under an earlier agreement containing an identical arbitration clause, collaterally estopped the union from seeking arbitration of the contracting-out issue involved in this case (or any other contracting-out grievance which might ever arise). This decision is simply wrong for three reasons:

(1) A decision on an issue of law rendered in an earlier suit for breach of contract does not operate as a collateral estoppel in a subsequent suit brought on another contract, even though the language of both contracts may be identical.

(2) The doctrine of collateral estoppel does not apply where, between the first action and the second one, inter-

vening judicial decisions have rendered the first decision obsolete.

(3) Even if the doctrine of collateral estoppel were applicable in this action, it could not bar the plaintiff's claim under subparagraph 1 of Section 10 A of the agreement (providing for arbitration of alleged violations of the agreement), since the earlier action was based solely on subparagraph 3 (providing for arbitration of alleged noncompliance with past practice).

All three of these principles are firmly established by this Court's decision in *Sunnen*. The question in that case was whether a taxpayer was liable for income tax on royalties paid by a corporation under several patent licensing agreements between the taxpayer and the corporation. The taxpayer claimed that he was not liable for taxes on these royalties because he had assigned his entire right, title and interest in the licensing agreements to his wife, and the royalties had in fact been paid to her. Moreover, the taxpayer claimed that the Commissioner was barred from asserting these tax claims because, in a prior proceeding, the Board of Tax Appeals had held that the taxpayer was not liable for income tax on the royalties paid to his wife under one of these licensing agreements.

The Court began its opinion by explaining the difference between *res judicata* and collateral estoppel. The former doctrine, the Court said, "applies to repetitious suits involving the same cause of action," and precludes relitigation of any matter which might have been raised in the original proceeding. 333 U. S. at 597. Collateral estoppel, on the other hand, applies "where the second action between the parties is upon a different cause or demand." In that situation, the Court stated:

> "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or

> points controverted, upon the determination of which the findings or verdict was rendered'. [citations omitted] *Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.*" 333 U. S. at 597-98 (emphasis added).

As applied to the present case, this means that—contrary to the holding of the court below—the earlier decision that a contracting-out grievance was not arbitrable under subparagraph 3 could not in any event bar a subsequent claim for arbitration of another grievance under subparagraph 1, since the latter claim, while "it might have been tendered and decided" in the first case, was "not in issue in the first proceeding."[9]

The first principle enunciated in *Sunnen* thus makes it clear that the doctrine of collateral estoppel provides no basis at all for denying the Union's claim under the recognition clause and directing summary judgment for the Company on that claim. The remainder of the *Sunnen* decision,

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[9] This principle was recognized by this Court as early as 1877 in *Cromwell* v. *County of Sac*, 94 U.S. 351, 353:

> "But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also, *Restatement, Judgments* § 70 Comment c (1943): "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action."

however, makes it clear that the doctrine of collateral estoppel does not provide any basis for directing summary judgment for the Company on either of the Union's claims.

After setting out the general rule of collateral estoppel, the Court in *Sunnen* went on to explain that that rule is not always applicable even to questions which have previously been litigated in prior actions between the same parties. Specifically, it is not to be applied if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ."

> "That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time . . ." 333 U.S. at 591.

The Court expressly stated that one type of intervening change which can make the doctrine of collateral estoppel inapplicable is "a modification or growth in legal principles as enunciated in intervening decisions of this Court . . ." 333 U.S. at 591.

Accordingly, even if the principle of collateral estoppel might otherwise be applicable in the present case, the fact that this Court's decisions in *American Manufacturing* and *Warrior & Gulf* were rendered subsequent to the earlier decision of the Court below, and totally undercut the basis on which that earlier decision was rendered, means that the parties are not bound to the obsolete principles of law relied on in the earlier case.[10] As the District Court in the present case stated, "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (J.A. 47).

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[10] See also *State Farm Mutual Ins. Co.* v. *Duel*, 324 U.S. 154, 162 (1945); Restatement, Judgments § 70 Comment f. (1943).

Finally, the Court in *Sunnen* pointed out that the earlier proceeding had involved royalty payments under only one licensing agreement executed in 1928, while the pending case involved payments under several other, though essentially identical, licensing agreements as well. Even though the issues raised under all of the licensing agreements were identical, the Court held that the doctrine of collateral estoppel, if applicable at all, could apply only to the taxability of the payments made under the particular agreement involved in the earlier proceeding:

> "... if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable reliance may be placed upon the ordinary rule of *stare decisis*. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matters raised in the second proceeding must involve the same set of events, or documents and the same bundle of legal principles that contributed to the rendering of the first judgment ..."

It is readily apparent in this case that the royalty payments growing out of the license contracts which were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though these contracts are identical in all important respects with the 1928 contract.

the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract . . ." 333 U.S. at 601-02.

Accordingly, the doctrine of collateral estoppel cannot apply in the present case at all, for the simple reason that the present action involves a different grievance, arising under a different collective bargaining agreement than was involved in the earlier decision.[11] The earlier case can therefore be relied on only as precedent, and its value as precedent is nil because of the subsequent contrary decisions of this Court.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted, and the judgment below summarily reversed on the authority of *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); and *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948).

Respectfully submitted,

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[11] See also, *Restatement, Judgments* § 70, Comments, b., e. (1943); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 7 (1942).

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 14183

SEPTEMBER TERM AND SESSION, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

v.

AMERICAN OIL COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION.

November 21, 1963

Before KNOCH, CASTLE and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Plaintiff, Independent Petroleum Workers of America, Inc. (Union), brought this action under and by virtue of Section 301 of the Labor-Management Relations Act of 1947 (29 U. S. C. A. Sec. 185), to require defendant, American Oil Company (American), to submit to arbitration a grievance that American had breached the collective bargaining agreement in effect between the parties by contracting out crane work to an independent contractor. Both sides moved for summary judgment. American's Motion was denied and the Union's granted. On March 13, 1963, the Court entered judgment against American and ordered it "to join with the plaintiff in the submission of

the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties." From this judgment American appeals.

The collective bargaining agreement insofar as here material consists of Article I, Recognition, and Article II, Grievance Procedure. The former is the common clause by which "the Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company * * *." The latter provides a step-by-step procedure for the resolution of grievances. This procedure culminates in compulsory arbitration in certain areas (as stated in plaintiff's brief) and is contained in Section 9 of Article II.

Subsection A, Section 10, Paragraph 1 of the same Article provides:

> "As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement."

This Paragraph is of a two-fold nature and plaintiff emphasizes in its brief that the instant case is predicated upon and involves only "alleged violations of the terms of this agreement." It states, "The parties agreed to refer to arbitration 'questions * * * arising from * * * alleged violations of the terms of this agreement.' It is under this clause, and solely under this clause, that Legal Paragraph I of the Plaintiff's amended complaint was brought." [1]

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[1] The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought.

Subsection A, Section 10, Paragraph 3 provides for arbitration of "Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from [describing situations in which the Paragraph is to be given application.]" We mention Paragraph 3 at this point only because plaintiff heretofore sought under it to compel arbitration of the same grievance. *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706.

Subsection D, Section 10, imposes a further limitation on arbitration:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

Plaintiff on brief states the contested issue:

> "Is the defendant required to submit to arbitration the violation of the collective bargaining agreement alleged by plaintiff?"

Defendant on brief states this issue in different phraseology but in substance the same:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?"

Defendant states a second contested issue:

"Does the prior adjudication of this Court of the same issue between the same parties require the denial of plaintiff's Motion for Summary Judgment and the granting of defendant's Motion for Summary Judgment?"

Much is stated in the briefs of both parties, particularly that of plaintiff, concerning three Supreme Court cases, all decided June 20, 1960, sometimes referred to as the "Steelworkers Trilogy." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593. We have read these cases many times and doubt if an attempt at detailed analysis would be of any benefit. The Court in *American*, as well as in *Warrior*, had before it an arbitration clause "as to the meaning, interpretation and application of the provisions of this agreement." Plaintiff here, as noted, expressly disclaims reliance upon such a basis but predicates its grievance upon a question directly involving an "alleged violation of the terms of this agreement." In any event, the so-called trilogy cases have not changed the long-established principle of law that compulsory arbitration cannot be properly awarded absent a contract between the parties agreeing thereto. Plaintiff appears to so recognize. Referring to the trilogy cases, in its brief it states that they "have now likewise left little doubt as to the duty of a court in its approach to the problem of arbitration in an industrial dispute situation."

Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its statement of the contested issue, as well as at other places in its brief. At one point it states, "There is only the issue of the agree-

ment—or non-agreement—of the parties to arbitrate." At another point it asks, "Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?"

As noted, plaintiff's claim for relief is based entirely upon the "alleged violations of the terms of this agreement." The question immediately arises—what terms? We find no answer in plaintiff's brief. However, in its complaint it alleged that defendant "violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby." This alleged violation refers to the recognition clause which provides, "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment." Certainly both defendant and plaintiff, having entered into the contract, were obligated to bargain in good faith, an obligation imposed by the National Labor Relations Act, 29 U. S. C. A. Sec. 158.

The recognition clause makes no reference either to arbitration or to the contracting out of work. More than that, the complaint, referring to Article II, alleged, "The plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to defendant for submission of the alleged violation to arbitration," and that the defendant refused to submit the said grievance to arbitration. The grievance procedure specifically provides for bargaining between the parties concerning any grievance in dispute. Section 9 of such procedure commences, "If the question is not settled as a result of negotiations[2] between the manager, or those designated by him, and the Union * * *." Then follow the provisions pertaining to arbitration which only when complied with make the question "eligible for re-

[2] The words "negotiations" and "bargaining" are used interchangeably in outlining the grievance procedure.

ferral to arbitration for settlement." Thus, the grievance procedure, including those provisions for bargaining on the question in dispute, must be followed step by step as a prerequisite to the right of either party to require arbitration. Plaintiff's allegation that the grievance procedure was followed is a clear admission that the parties had bargained without success concerning the issue in dispute.

Plaintiff in its brief states, "This provision [referring to Section 10, Subsection A, Paragraph 1] of the grievance procedure simply states that a grievance matter which comes into existence because of the allegation of either party that the agreement has been violated is such a question as the parties have contractually bound themselves to arbitrate." In other words, it is plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration. This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.

Plaintiff's position is devoid of all logic. It is without merit and we so hold. Particularly is this so under the facts of the case where the complaint clearly demonstrates that the parties did bargain on the grievance in dispute.

There are other facets of the case which fortify the conclusion just stated. Subsection D of Section 10 (heretofore quoted) is a further limitation upon the arbitration provision of Section 9. Subsection D provides that the Company will bargain with the Union regarding matters not covered in the collective bargaining agreement but either party may refuse to arbitrate any such matter. Defendant contends the provision excludes from arbitration the contracting out of work because it is not covered in the agreement. Plaintiff makes no response to this contention. While we think there is plausibility in defendant's contention, we need not resolve it. The section is significant because the parties agreed that certain disputes were not sub-

ject to compulsory arbitration, which destroys plaintiff's theory that the mere allegation of contract violation requires arbitration.

The bargaining history between plaintiff and defendant relative to the right of the latter to contract out work is much discussed in the briefs. Plaintiff urges that such history is irrelevant. We think, however, it has some significance and may properly be considered. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (concurring opinion, page 569). *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F. 2d 244, 247. This bargaining history is set forth in our previous decision. 275 F. 2d 706, 708. In brief, it shows that plaintiff for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting the right of the defendant to contract out work. On each occasion the proposal was rejected. This bargaining history while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit.

This brings us to the issue as to whether plaintiff is barred from pursuing the instant action by reason of the prior decision of this Court. 275 F. 2d 706. Defendant contends that it is, under both the doctrines of stare decisis and collateral estoppel. Plaintiff devotes most of its argument to the former and asserts, "If the defendant fails with stare decisis, it fails equally with 'prior adjudication.'" We think this is an erroneous statement but find it unnecessary to distinguish the two doctrines because we reach the conclusion that plaintiff is barred by collateral estoppel.

Plaintiff's sole argument in opposing the application of this doctrine is that "the cause of action is different," which presents the nib of the matter. In considering this issue, we have carefully examined the briefs, pleadings and opinion of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case. The two cases

involve the same parties,[3] with the same attorneys. The collective bargaining agreement in each case, including the provision for arbitration with the limitations thereon, is the same. The contested issue in both cases, as stated in plaintiff's briefs, was whether the defendant agreed to arbitrate its right to contract out work. Plaintiff's prayer for relief in the former case was:

> "Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement * * *."

Its prayer for relief in the instant case is exactly the same. It is true, as plaintiff points out and as the opinion of this Court discloses, plaintiff in the former case relied upon Paragraph 3, Subsection A, Section 10, in support of its contention that defendant was required by the terms of the agreement to arbitrate the question in dispute, while in the instant case it relies upon Paragraph 1 of the same section and subsection. The point is, however, that plaintiff might have relied upon Paragraph 1 in the previous suit but failed to do so. Its failure in this respect was not explained in its brief; neither was it explained by plaintiff's counsel during oral argument when given an opportunity to do so.

We think the conclusion inescapable that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only difference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case.

The cases which have dealt with the issue generally refer

[3] The contract in suit was entered into with Standard Oil Company, the named defendant in the prior suit. American, the named defendant in the instant suit, is the successor to Standard.

to and cite *Cromwell* v. *County of Sac*, 94 U. S. 351. In that case the Court discusses the difference between the effect of a judgment as a bar or estoppel to the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. The Court stated (page 352):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.*" (Italics supplied.)

In *Grubb* v. *Public Utilities Commission of Ohio et al.*, 281 U. S. 470, 478, the Court stated:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that."

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597, the Court stated:

> "The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other ad-

missible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac,* 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."

There are many other cases to the same effect. See *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 623; *United States* v. *International Building Co.,* 345 U. S. 502, 504; *Lynch* v. *Commissioner of Internal Revenue,* 216 F. 2d 574, 579, and *First National Bank in Wichita* v. *Luther,* 217 F. 2d 262, 265. Sometimes the doctrine is referred to as res judicata, as it was in *Luther,* wherein the Court stated:

"It is the general rule that where a second suit between the same parties, or their privies, is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated and as to every issue, claim, or defense which might have been presented * * *."

Plaintiff, so far as we are aware, did not petition the Supreme Court for certiorari in the case previously before this Court. In this connection, a statement in *Brownell* v. *Chase National Bank,* 352 U. S. 36, appears pertinent. The Court stated (page 39):

"Under familiar principles of res judicata, the claim so tendered may not be relitigated. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Tait* v. *Western Maryland R. Co.,* 289 U. S. 620, 623. If he was not content with the first ruling, his remedy was by certiorari to this Court. *Angel* v. *Bullington,* 330 U. S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issue tendered in the first suit."

Absent the application of the doctrine of collateral estoppel, we have before us a situation in which plaintiff relied yesterday upon one provision of the collective bargaining agreement in support of its claim or demand that defendant be required to submit to compulsory arbitration; today it relies upon a different provision of the same agreement in support of the same claim or demand; and tomorrow it will be at liberty to rely upon still another provision of the same agreement in support of the same claim or demand. It is our judgment that the doctrine should be applied and given effect.

Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action.

The judgment is reversed and the cause remanded, with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

Thursday, November 21, 1963
Before
Hon. MIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. J. EARL MAJOR, Circuit Judge

[Caption Omitted]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 12802-12803

March 2, 1960

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY,
Defendant-Appellee.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

v.

STANDARD OIL COMPANY,
Defendant-Appellant.

CASTLE, Circuit Judge.

This is an action brought under § 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185 to compel arbitration under the provisions of a collective bargaining agreement. Independent Petroleum Workers of America, Inc., plaintiff, filed a complaint in the District Court seeking to compel the Standard Oil Company, defendant, to join in

submitting to arbitration two grievances concerning the performance of maintenance and repair work by an independent contractor. The complaint was later amended to ask similar relief with respect to an additional dispute involving the seniority of an employee.

The issue relating to the maintenance and repair work was submitted on the pleadings and a stipulation of facts. Both parties moved for summary judgment on the issue relating to seniority rights. The District Court found for and entered judgment in favor of the defendant in so far as the maintenance and repair work dispute was concerned and the plaintiff appealed. Plaintiff's motion for summary judgment was granted and judgment entered for plaintiff ordering the defendant to join in the submission of the seniority rights dispute to arbitration. Defendant appealed as to this judgment.

The contested issue involved in both appeals is whether the respective grievance or dispute is one with respect to which the parties in their collective bargaining agreement have agreed to arbitration.

The agreement provides for the arbitration of unsettled grievances. Section 10 then imposes limitations on arbitration which, in so far as here pertinent, provide:

> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> "2. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
>
> "3. Questions of applications or interpretations of or alleged noncompliance with past policies, prac-

tices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement."

The plaintiff contends that the grievances concerning performance of maintenance and repair work by an independent contractor are arbitrable under the provisions of Section 10 A. (3) of the agreement referring to past practices relative to working conditions.

For many years the defendant has used both its own employees and independent contractors to perform maintenance and repair work at its Whiting, Indiana, Refinery. Approximately 90% of such work has been performed by company employees rather than independent contractors. In using independent contractors to perform maintenance and repair work, certain factors were considered by the defendant; among these were the availability of qualified employees, whether the work involved secret, patented or unique processes or materials, whether the defendant had the equipment to perform the work, whether the independent contractor guaranteed the quality of the work, economic considerations, previous experience with its own employees in similar work, and whether the work was hazardous or disagreeable. Where practicable, defendant uses its own employees, but a partial list of maintenance and repair work contracted out at the Whiting Refinery during the years 1953 to 1958, inclusive, contains over 250 examples of various [redacted] of maintenance and repair work performed by indepe[redacted]t contractors.

Prior to 1952 several collective bargaining agreements be-

tween the parties required submission to arbitration of substantially any dispute. In 1952 the limitations contained in Section 10 A. were incorporated into the agreement. During negotiations in 1955 with relation to modifications and revision of the agreement, the plaintiff Union proposed a "contracting out of work" clause which would have prevented the defendant from contracting any work to independent contractors, provided the defendant had the equipment and qualified employees necessary to perform the work. This proposal was rejected by the defendant. During similar negotiations in 1957 a rejected Union proposal would have precluded the use by defendant of independent contractors for work involving any craft while defendant's own employees with seniority in such craft were performing lower rated labor work, unless defendant's own employees with seniority in the particular craft were returned to their craft jobs and rates while the employees of the independent contractors were performing any work involving the same work in defendant's plant. Again, in 1959, defendant rejected a Union proposal that a clause be incorporated in the agreement which would provide that the company would not contract out work normally performed by the production and maintenance employees at the refinery.

In October of 1957 the defendant contracted with an independent contractor for the performance of certain maintenance and repair work involving the repair and refinishing of stucco walls of a truck garage at the Whiting Refinery and in connection therewith employees of the independent contractor built and tore down a scaffold and performed certain cement or stucco finishing. The incident precipitated the filing of two grievances by plaintiff, as follows:

> "Independent Petroleum Workers of America requests that Carpenters backed down to labor be paid the craft rate for work performed by contractors (scaffold building and tear down) in the Truck Garage."
>
> "The Board of Directors of the Independent Petro-

leum Workers of America requests that as required by the recognition clause of the applicable agreement and established past policy, practice, custom and usage, employees classified as Cement Finishers be assigned and perform all cement finishing work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work be compensated by the appropriate rate for all time and pay so lost."

Both grievances were denied and the defendant refused to submit them to arbitration on the ground that they were not arbitrable under the terms and provisions of the agreement.

[1] Since *Textile Workers Union of America* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, the district courts are empowered under § 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185 to decree specific performance of an agreement to arbitrate a grievance dispute. *Brass and Copper Workers Federal Labor Union, etc.* v. *American Brass Company*, 7 Cir., 272 F. 2d 849. But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. *Local 1912, International Association of Machinists* v. *United States Potash Company*, 10 Cir., 270 F. 2d 496.

The bargaining agreement between the plaintiff and defendant contains no express reference to the subject of contracting out of any kind of work to independent contractors. The subject matter of a dispute or grievance in order to be arbitrable under the provisions of Section 10 A. (3) of the agreement, relied on by plaintiff, must concern a past policy, practice, custom or usage relative to working conditions.

[2] In our opinion the language of Section 10 A. (3) of the agreement relating to past policies, practices, customs or

usages "relative to working conditions" was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors. *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Navigation Company*, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The continued bargaining on the subject evidences their intent and understanding.

In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative. The defendant in determining what would be done through independent contractors was guided by a number of factors and considerations including practicability and advantages to be derived. That company employees performed 90% of such work does not establish that such result was dictated by a policy relative to "working conditions" as opposed to an exercise of business judgment by management on the various factors involved. There is no disclosure of any pattern in which consideration of employee working conditions operated to restrict the exercise of managerial prerogative.

In *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 6 Cir. 161 F. 2d 949, relied upon by plaintiff, arbitrability of the question of contracting out work was recognized as an interpretation of a management function clause of the agreement there involved. That case is of no assistance to the plaintiff. It supports the defendant's contention that the performance of work by independent contractors is a subject matter within managerial function and prerogative rather than "relative to working conditions." And *Local 1912, International Association of Machinists* v. *United States Potash Company*, 10 Cir., 270 F. 2d 496, 498,

also relied upon by plaintiff, did not involve the limitation upon arbitrable subject matter present in the instant case. The contract there considered was "not couched in terms of specified grievances which are to be arbitrated, thereby excluding all other by implication." Nor did the case involve construction of a "past policies * * * relative to working conditions" clause such as is here relied upon. The case is no authority for finding arbitrability under Section 10 A. (3), relied upon by plaintiff.

[3] The trial judge did not err in refusing to order the defendant to submit the grievances relating to the maintenance and repair work to arbitration. The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and the promise broken that the court will order arbitration. *Local No. 149 of American Federation of Technical Engineers (AFL)* v. *General Electric Company*, 1 Cir., 250 F. 2d 922, certiorari denied, 356 U. S. 938, 78 S. Ct. 780, 2 L.Ed. 2d 813.

The dispute as to seniority rights related to Rolland Hopper, a non-supervisory employee of defendant at the Whiting Refinery. On September 12, 1958, he was advanced from the nonsupervisory classification of crane operator to the supervisory position of "Foreman-Transportation, Pro-Tem" in the crane department. About September 14, 1958, Hopper and certain other Whiting Refinery supervisors were sent to defendant's Mandan, North Dakota, Refinery to perform temporary work at that refinery while its employees were on strike. Hopper and the other foremen were informed that this was a temporary assignment, and all of these foremen remained on the Whiting payroll. About October 3, 1958, Hopper and the other supervisors returned to the Whiting Refinery where Hopper resumed his supervisory duties. About October 20, 1958, Hopper was returned to the non-supervisory classification of crane operator and his seniority rights in the non-supervisory class as they existed before his promotion were recognized.

During the period involved, and since the year 1945, the seniority list of employees, posted in the crane department, pursuant to Article IX, Section 1, of the collective agreement provided:

> "An employee who has been advanced from any hourly rate job, when reduced, will assume a position in any lower classification in line with his service rights in that classification."

The Union protested recognition of Hopper's seniority rights and filed the following grievance:

> "The IPWA Board of Directors requests that the job and departmental dates of Rolland Hopper (1961) be deemed forfeited by virtue of his having accepted supervisory employment at another installation location (Mandan), and that the available employees displaced by him on October 20, 1958 be paid what they would have earned had they not been displaced."

[4] The defendant concedes that there can be no question that the matter of seniority is a condition of employment. Defendant's rule governing seniority constitutes a past practice and policy relative to working conditions within the scope of Section 10 A. (3) of the bargaining agreement. The grievance raised a question as to the interpretation or application of the rule. The District Court did not err in ordering the defendant to join in the submission of this grievance to arbitration.

Each of the judgment orders is affirmed.

Affirmed.

SCHNACKENBERG, Circuit Judge (specially concurring).

I would hold that both of the disputes involved in this case are arbitrable under section 10 A of the agreement.